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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

VIVIAN DAOUST et al., Plaintiffs and Appellants, v. BRIAN EDWARDS et al., Defendants and Respondents.	C081184 (Super. Ct. No. 39201300296303CUPLSTK)

Plaintiffs Vivian and Richard Daoust (Daoust) filed suit against defendants ATG Rehab Specialists, Inc. (ATG), a supplier of medical equipment and Brian Edwards, technician for ATG, alleging the wheelchair they supplied the Daousts' son Donald ultimately caused his death. The trial court granted Edwards and ATG's motion for summary judgment. On appeal, proceeding in pro. per., Daoust argues evidentiary error and procedural error. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In their second amended complaint, Daoust alleged Edwards and ATG supplied a wheelchair to their deceased son Donald that caused him to suffer from "rapid and severe" progression of scoliosis, causing his death. Daoust argued the wheelchair lacked the necessary anti-thrust lift, hip blocks, and head support system. According to Daoust, Edwards and ATG breached their duty to provide Donald with a properly fitted wheelchair. The second amended complaint alleged causes of action for: (1) products liability, failure to provide necessary supportive equipment; (2) negligence, failure to follow-up and respond to a dangerous situation; (3) negligence, failure to warn; (4) survival; and (5) wrongful death. Daoust sought punitive damages.

ATG filed a demurrer and motion to strike portions of the second amended complaint. The trial court granted ATG's motion to strike Daoust's claim for punitive damages without leave to amend and sustained the demurrer as to all Daoust's causes of action except the products liability cause of action without leave to amend.

First Motion for Summary Judgment

Edwards and ATG filed a motion for summary judgment arguing Daoust failed to establish that ATG's wheelchair caused Donald's death. In support, Edwards and ATG relied on a declaration by Mitchell Katz, M.D. In opposition, Daoust submitted the declaration of occupational therapist Margaret Bledsoe.

The trial court denied Edwards and ATG's motion for summary judgment, finding: "Moving party fails to meet its moving burden because it has failed to submit true, correct and complete copies of the medical records and discovery responses relied upon by Dr. Katz in rendering his opinions in this action. [Citation.] Plaintiffs' opposition declaration fails for the same reason." The trial court allowed Edwards and ATG to submit the relevant records and refile the motion. In addition, the trial court granted Edwards and ATG's application to file Donald's medical records under seal.

Second Motion for Summary Judgment

Edwards and ATG filed a second motion for summary judgment, supported by an amended declaration of Dr. Katz.

In Dr. Katz's opinion, relying on Donald's medical records, ATG's wheelchair did not cause or contribute to Donald's death. Donald's death was caused by chronic lung disease, borne out by a history of chronic lung changes on chest x-rays, providers' notations of aspirations, and documented poor motor function. As a result of the chronic aspiration, Donald developed chronic lung disease complicated by severe malnourishment. Donald also suffered from asthma, which resulted from his recurrent aspiration.

Dr. Katz stated the wheelchair supplied by ATG neither caused Donald's severe scoliosis nor exacerbated it. Donald's history of scoliosis was a common condition in patients with cerebral palsy.

Daoust's opposition relied on the declarations of occupational therapist Margaret Bledsoe and Vivian Daoust. Bledsoe stated ATG's wheelchair "most likely would have and probably did cause the pressure sore, breathing difficulties, feeding/digestive issues, severe scoliosis, lung disease, malnutrition and potential aspiration." In their reply, Edwards and ATG objected to the declarations of Bledsoe and Vivian Daoust.

Following oral argument, the court granted Edwards and ATG's motion for summary judgment. The court sustained their objections to Bledsoe's declaration as failing to raise a triable issue of fact.

The court entered judgment for Edwards and ATG. Daoust filed a timely notice of appeal.

DISCUSSION

I

Standard of Review

A motion for summary judgment must be granted if the submitted papers show there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 844.) The moving party, whether plaintiff or defendant, initially bears the burden of making a "prima facie showing of the nonexistence of any genuine issue of material fact." (*Id.* at p. 850.) "Thus, if a plaintiff who would bear the burden of proof by a preponderance of evidence at trial moves for summary judgment, he must present evidence that would require a reasonable trier of fact to find any underlying material fact more likely than not -- otherwise, he would not be entitled to judgment as a matter of law, but would have to present his evidence to a trier of fact." (*Id.* at p. 851, italics omitted.) Once the moving party has met its burden, the burden shifts to the opposing party to show the existence of a triable issue of material fact. (Code Civ. Proc., § 437c, subds. (a), (p)(2).)

We review de novo the record and the determination of the trial court. First, we identify the issues raised by the pleadings, since it is these allegations to which the motion must respond. Second, we determine whether the moving party's showing has established facts negating the opponent's claims and justifying a judgment in the moving party's favor. When a summary judgment motion prima facie justifies a judgment, the final step is to determine whether the opposition demonstrates the existence of a triable issue of fact. (*Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1067; *Barclay v. Jesse M. Lange Distributor, Inc.* (2005) 129 Cal.App.4th 281, 290.)

On appeal, a party challenging an order has the burden to show error by providing an adequate record and making coherent legal arguments, supported by authority, or the

claims will be deemed forfeited. (See *People v. Freeman* (1994) 8 Cal.4th 450, 482, fn. 2; *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575; *In re S.C.* (2006) 138 Cal.App.4th 396, 408.) The rules of appellate procedure apply to plaintiffs even though they are representing themselves on appeal. (*Leslie v. Board of Medical Quality Assurance* (1991) 234 Cal.App.3d 117, 121.) A party may choose to act as his or her own attorney. We treat such a party like any other party, and he or she " 'is entitled to the same, but no greater consideration than other litigants and attorneys. [Citation.]' " (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1247.)

II

Evidentiary Issues

Daoust alleged the wheelchair supplied by ATG caused Donald to suffer a rapid progression of his scoliosis, ultimately resulting in his death. In order to establish their claim, Daoust must prove causation. On appeal, Daoust challenges the trial court's reliance on Dr. Katz's testimony regarding causation.

A plaintiff in a personal injury action must prove causation within a reasonable medical probability. Mere possibility of causation is insufficient to establish a prima facie case. (*Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367, 1384.) Causation must be proven within a reasonable medical probability based on competent expert testimony. (*Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 403.) A qualified medical expert may testify as to causation, when the issue is sufficiently beyond the realm of common experience that the expert's opinion will assist the jury in determining causation. (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117.)

Dr. Katz's Declaration

Daoust argues the trial court erred in relying on Dr. Katz's declaration. According to Daoust, Dr. Katz specializes in pediatric gastroenterology and nutrition, but has no

special training in "Complex Rehab Technology, equipment or seating systems and therefore is not qualified to make a determination as to the defectiveness of a wheelchair . . . Dr. Katz's lack of qualification to assess said wheelchair voids his qualifications to determine what effects a defective wheelchair would had have upon the deceased. Dr. Katz is not qualified as an expert in scoliosis. Dr. Katz's lack of qualification in scoliosis voids any opinion he may offer as to whether it was caused by the wheelchair in question."

Dr. Katz is board certified in pediatrics, pediatric gastroenterology, and pediatric advanced life support. Over his career, Dr. Katz has treated hundreds of children with cerebral palsy.

Dr. Katz formed his opinion based on his education, training, qualifications, experience, research, and his review of the case-specific materials. According to Dr. Katz, Donald died as a result of chronic lung disease, the result of chronic aspiration. Donald chronically aspirated food he was being fed orally. In addition, Donald's asthma, listed as a cause of death on the death certificate, resulted from his chronic aspiration. Donald also had a long history of severe scoliosis, a condition commonly associated with cerebral palsy. In Dr. Katz's opinion, Donald died as a result of chronic lung disease, not as a result of his wheelchair. Daoust did not object to Dr. Katz's declaration.

The trial court did not err in considering Dr. Katz's declaration. Edwards and ATG provided the court with Dr. Katz's qualifications; Dr. Katz provided the basis and reasoning for his expert opinion on the cause of Donald's death.

Margaret Bledsoe's Declaration

Daoust contends the trial court improperly excluded the expert opinion of Margaret Bledsoe. According to Daoust, Bledsoe, an occupational therapist, was highly qualified to provide testimony regarding decedent's condition in relationship to

rehabilitative equipment. Bledsoe has "almost 40 years working with children exactly like the deceased."

In her declaration Bledsoe stated, based on her education, training, qualifications, experience, and review of the case file, that the wheelchair had improper critical support devices required to assure the health and safety of an individual with disabilities. According to Bledsoe: "It is my opinion, without a doubt, that over the extended period of time (23 months) that Donnie utilized it, said seating system most likely would have and probably did cause the pressure sore, breathing difficulties, feeding/digestive issues, severe scoliosis, lung disease, malnutrition and potential aspiration that Dr. Michael Katz for the defense has cited as cause of death."

The trial court sustained Edwards and ATG's objections to Bledsoe's declaration on the grounds of a lack of foundation, speculation, conjecture, and hearsay. (Evid. Code, §§ 403, 702, 720, 803, 810, 1200) We review the trial court's evidentiary findings for an abuse of discretion. (*DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 679.)

A witness may not testify as an expert unless they have the special knowledge, skill, experience, training, or education sufficient to qualify the witness as an expert on the subject of their testimony. (Evid. Code, § 720.) The issue of medical causation requires expert medical testimony. The court must consider whether the witness has sufficient skill or experience in a particular field so that his or her testimony would be likely to assist the jury in determining causation. (*Salasguevara v. Wyeth Laboratories, Inc.* (1990) 222 Cal.App.3d 379, 385.)

Bledsoe's qualifications fall far short of such expert credentials. She is a school occupational therapist with a bachelor's degree in occupational therapy and a master's degree in human relations and supervision. Daoust accuses Edwards and ATG of attempting to diminish Bledsoe's accomplishments by referring to her as a school occupational therapist. In evaluating Bledsoe's credentials we do not demean or question

her work and accomplishments, but only point out her lack of expertise in the precise medical causation at issue before us.

The court also found Bledsoe's opinions lacked foundation. Under Evidence Code section 801, subdivision (b) a court must determine whether " 'the matter that the expert relies on is of a type that an expert reasonably can rely on "in forming an opinion upon the subject to which his testimony relates." . . . We construe this to mean that the matter relied on must provide a reasonable basis for the particular opinion offered, and that an expert opinion based on speculation or conjecture is inadmissible.' " (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 770, italics omitted.)

Bledsoe's declaration states the wheelchair "most likely would have and probably did cause" Donald's medical issues because it had "improper critical supportive devices required to assure the health and safety of an individual with disabilities." However, Bledsoe provides no foundation for this conclusion. She cites no studies or research on which she bases her opinion on the question of causation. Bledsoe relies on a graph she created to examine the "correlation between medical records, health issues and in this case the postural support provided by the seating system/wheelchair." However, neither Daoust nor Bledsoe provide any scientific support for utilizing this methodology to form an expert opinion. We find the trial court did not abuse its discretion in excluding Bledsoe's opinion.[1]

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[1] Daoust notes Bledsoe mistakenly used the phrase "In my medical opinion" in her declaration. Instead, Bledsoe should have stated "In my professional opinion." Daoust asks that this mistake not influence our analysis of Bledsoe's qualifications. Our analysis does not fault Bledsoe for her phraseology.

Vivian Daoust's Declaration

Daoust also argues the trial court erred in not allowing Vivian Daoust's expert opinion. Daoust concedes that Vivian, Donald's mother, lacks a degree or training in gastroenterology, pediatric medicine, cerebral palsy, or scoliosis.

However, Vivian Daoust "had an extensive, (often exhausting) 17 year education on all these matters regarding her son. From the moment she learned of his disabilities she . . . educated herself on every one of these subjects in order to care for the unique needs of her child . . . Raising a child with disabilities such as the deceased opens a realm of possibilities unfathomable to the everyday parent. There is no group of experts on the specific needs of any one of these children. There are only general guidelines to help try to understand. Ms. Daoust was responsible for every aspect of her child's care from feeding to changing diapers. Her son was unable to communicate with conventional, understandable methods. Ms. Daoust had to recognize and interpret every sound, movement, grimace and laugh. There was and still is only one expert on the specific need of Donnie Daoust . . . his mother. Ms. Daoust was his only link and advocate to the outside world. 24/7 for 17 years she was his voice with Doctors, Educators, Government Agencies, etc."

We acknowledge and respect Vivian Daoust's unique understanding of her son's needs and interactions with the outside world. The resilience and strength required of a parent in these circumstances is both staggering and inspirational. However, we are bound by the law in determining whether the court abused its discretion in declining to consider Vivian Daoust's declaration as expert opinion on the issue of causation.

Daoust sought to introduce Vivian Daoust's testimony to establish a connection between the wheelchair and Donald's death. As noted, Daoust bears the burden of establishing causation based upon competent expert testimony. (*Cottle v. Superior Court, supra,* 3 Cal.App.4th at p. 1384; *Jones v. Ortho Pharmaceutical Corp., supra*,

163 Cal.App.3d at p. 403.) We find no abuse of discretion in the trial court's decision not to consider Vivian Daoust's testimony.

III

Procedural Issues

Second Motion for Summary Judgment

Daoust contends the trial court erred in allowing Edwards and ATG to file a second motion for summary judgment after denying the first motion. In support, Daoust cites Code of Civil Procedure sections 437c, subdivision (h) and 437c, subdivision (m).

The trial court denied Edwards and ATG's first motion for summary judgment because they failed to submit true, correct, and complete copies of the medical records and discovery responses relied upon by Dr. Katz. The trial court gave Edwards and ATG the opportunity to submit the records and refile the motion. Subsequently, Edwards and ATG refiled their motion for summary judgment and included Dr. Katz's amended declaration.

Daoust argues the court ran afoul of Code of Civil Procedure section 437c, subdivision (h) which states: "If it appears from the affidavits submitted in opposition to a motion for summary judgment . . . that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just." However, section 437c, subdivision (h) applies to oppositions to summary judgment not the summary judgment itself. Moreover, the court denied the motion without prejudice to allow Edwards and ATG to refile it with the required medical records. We find no error.

Daoust also contends, under Code of Civil Procedure section 437c, subdivision (m), Edwards and ATG should have appealed the denial of their summary judgment

motion within 20 days. However, section 437c, subdivision (m) applies to the appeal of a summary judgment motion that has been granted not denied.

Demurrer

Finally, Daoust states the court erred in granting Edwards and ATG's "motions to demur and dismiss." However, Daoust fails to set forth either a coherent argument or applicable law to support their argument.

DISPOSITION

The judgment is affirmed. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

RAYE, P. J.

We concur:

BLEASE, J.

MURRAY, J.